Supreme Court of the United States

October Term, 1919

No. 102

THE CUYAHOGA RIVER POWER COMPANY
Appellant

against

THE NORTHERN OHIO TRACTION AND LIGHT COMPANY and THE NORTHERN OHIO POWER COMPANY
Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

BRIEF FOR APPELLANT

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BRIEF FOR APPELLANT

Statement of the Case

This is a bill in equity, brought by the appellant in August, 1916, to enjoin the defendants, acting under color of authority of State laws and under an assertion of power from the State, from a continuous interference with certain franchises and other property rights previously granted to the appellant by the State. A motion to dismiss, amounting practically to a demurrer for want of equity, was granted by the Court below, and be-

cause of constitutional questions the case is brought here on direct appeal under Section 238 of the Judicial Code.

Facts

The plaintiff was chartered under the laws of Ohio to build and maintain a system of dams, canals, and locks in the Big Cuyahoga River for the generation of electricity for light, heat and other purposes. Its charter confers authority to acquire by condemnation or purchase the lands necessary for, and to construct thereon, the dams, locks and other parts of its plant (Record, pp. 1, 2; 240 U. S., 462, 463; 244 U. S., 300, 301; 246 U. S., 242, 248).

By resolution of its board of directors, it adopted, after its incorporation, a specific and detailed plan for the development of hydro-electric power from the waters of the river and the sale of the same to the public, and entered upon and surveyed the lands necessary to carry out the plan and resolved and determined to acquire them (Bill, Par. Fifth, and Exhibit A; Rec. pp. 2, 16-23).

Among the necessary lands so entered upon and surveyed by the plaintiff, and included in its plan and resolution, are three parcels described in the bill as *Everett Parcel, Sackett Parcel* and *A B & C Parcel,* which constitute a part of the bed and banks of the river and are so situated that the improvement provided for in the plaintiff's charter and plan cannot be constructed without a taking thereof by the plaintiff (Bill, Par. Sixth, Rec. pp. 2, 3). These parcels, at the time of the adoption of the plan and for long afterwards, were vacant and unimproved and unused, and neither the defendants herein nor any other person or

corporation (other than the plaintiff) had made any location of any proposed improvement or structure for utilizing them for the development of power, or had obtained any grant therefor from the State of Ohio (Bill, Par. Eleventh). The defendant Traction Company was asserting some interest in the *Everett parcel* by virtue of some agreement with Henry A. Everett, the record owner (Bill, Par. Sixth), but this assertion is expressly negatived in the bill (Par. Fifteenth), and Everett afterwards conveyed the land to a real estate concern by an absolute fee simple deed (Bill, Par. Eighth).

After the plaintiff had adopted its development plan and commenced condemnation proceedings for the acquisition of said Everett, Sackett and A B & C parcels, and other parcels of land needed by it for carrying out said plan, the defendant Northern Ohio Power Company was, or claims and purports to have been, incorporated under the same statute under which the plaintiff was incorporated, and for purposes similar to the plaintiff's purposes, by the filing of articles of incorporation which specify as the place for its improvement a site which conflicts with the location previously specified in the plaintiff's articles and plan and resolution (Bill, Par. Fourteenth).

Said defendant then purchased the Everett and Sackett parcels above mentioned (Bill, Par. Tenth), and utilized them in the construction of a small hydro-electric plant and a steam power plant that uses the waters of the river for the generation of steam (Bill, Par. Twelfth). It then sold those parcels, and all its other property, rights, and franchises, to the defendant Traction Company, which took possession thereof and is now using, in its street railway business, the power generated at the power plants so constructed upon

said parcels (Bill, Pars. Tenth, Fourteenth). The parcels were purchased, both by the defendant Power Company and the defendant Traction Company, and the power plants were constructed, with notice and actual knowledge of the plaintiff's charter and plan of development (Bill, Par. Thirteenth).

The sale by the defendant Power Company to the defendant Traction Company was made under color of and pursuant to authority claimed to have been conferred by certain orders of the Public Utilities and Public Service Commissions of Ohio which are annexed to the bill (Bill, Par. Tenth and Amendment, p. 32; Exhibits B, C, and E).

The defendant Traction Company was incorporated before the plaintiff, but not under the statute under which the plaintiff was incorporated nor for the purpose named in such statute; and its articles of incorporation do not set forth any *terminu* of any proposed improvement as provided in Section 8625 of the Ohio Code; and its only right or franchise to construct or maintain the power plants erected upon the parcels of land here in question is that derived from its purchase of the property, rights, and franchises of the defendant Power Company (Bill, Pars. Fourteenth, Fifteenth, Sixteenth).

Nevertheless, the defendant Traction Company asserts and claims that the construction of said power plants and its use of the same constitutes a devotion of said parcels to a public use *and that for that reason said parcels cannot be taken or appropriated by the plaintiff* (Bill, Par. Seventeenth). It founds its claim upon State laws, *i. e.*, the incorporation of the defendant Power Company and the Commission orders set forth in the bill (*Idem*). And, acting upon such claim, it is

using and, unless enjoined, will continue to use, said parcels for itself and resist and deny the plaintiff's right to acquire or use them (*Idem*).

Quite obviously, the defendants' present use of the parcels for power-development purposes makes it impossible for the plaintiff to use them for the same purpose or otherwise proceed with its enterprise; and the defendants' assertion and claim that by reason of their own use the plaintiff has no right or power to acquire the land for its purposes constitutes a cloud upon the title of the plaintiff to its franchise and a continuous interference with such franchise (Bill, Par. Eighteenth, Nineteenth. See, also Par. Twentieth).

And as the plaintiff's franchise constitutes a contract and the defendants' interference therewith is grounded upon subsequent State laws, there is an impairment of the plaintiff's contract and a taking of its property without due process of law in violation of the contract and due process clauses of the Federal Constitution (Bill, Pars. Nineteenth, Twenty-second).

Decision Below. Specification of Errors.

The Court below dismissed the bill substantially upon the ground that the plaintiff had no rights. The opinion seems to have been profoundly influenced by the idea that inasmuch as the defendant Traction Company was already in possession and actually using the land for power-development purposes it would be rather uneconomical to put the defendant out in order to let the plaintiff come in (see passages at Record, pp. 38, 39, 40).

The legal principle upon which the decision rests is that the plaintiff's adoption of its plan of development and the location of its improve-

ment upon specifically described lands gave it no right to exclude rival companies from that location because Section 19 of Article I of the Ohio Constitution provides that a condemning corporation does not acquire title to the soil until the owner's compensation is assessed and paid (Rec. p. 39).

The first mentioned idea is sufficiently repudiated by *Denver v. Rio Grande R. R. Co. v. Arizona & Colorado R. R. Co.*, 233 U. S., 601, in which this Court, at the suit of a company which had simply located its line, ousted a completed railroad which had been constructed at a cost of $800,000 and was actually in operation.*

With respect to the holding that Section 19 of Article I of the Ohio Constitution militates against the plaintiff's claim, it seems apparent that the Court below adopted the view so earnestly pressed by defendants' counsel that the suit in some way seeks to violate that provision by ousting the defendants from the possession of their "privately owned" lands and obtaining possession thereof for the plaintiff in advance of condemnation. We hence desire to emphasize at the outset that we make no claim of any right to oust the defendants from their possession, or of any right on the part of the plaintiff to take possession in advance of actual payment of compensation. The relief to which we insist the plaintiff is entitled in this suit is a decree establishing its title to its franchise, *i. e.*, establishing its right to proceed with its enterprise, and removing the cloud cast upon its title by the defendants' assertions and claims that the plaintiff's rights have been defeated by their own purchase and use of the land, by enjoining

* This information is obtained from the record and briefs in that case in this Court.

the defendants from using the land *for power-development purposes* and from asserting such use as a bar to the plaintiff's right to acquire the land by the orderly processes of condemnation.

The assignment of errors will be found at pages 42 to 44 of the Record. Those specially relied upon are the *third* to *seventh* inclusive, which are as follows:

> "3. The Court erred in refusing to hold that by its resolutions set forth in the complaint, the plaintiff definitely located its proposed improvements upon specifically described parcels of land, and by such location acquired a prior and exclusive right to take, occupy and use the lands and waters covered by said location for the purposes expressed in the plaintiff's charter, and that such right is a contract right and a right of property, the title, possession, use and enjoyment of which are protected from impairment or deprivation by Section 10 of Article I of the Constitution of the United States and the Fourteenth Amendment to said Constitution.
>
> "4. The Court erred in refusing to hold that the acts and proceedings of the defendants set forth in the bill and the orders of the Public Service Commission of Ohio and Public Utilities Commission of Ohio, set forth in the bill, constitute an impairment of the obligation of the contract, grant, and franchise of the plaintiff, in violation of Section 10 of Article I of the Constitution of the United States, and a taking and deprivation of the property of the plaintiff in violation of the due process clause

of the Fourteenth Amendment to the Constitution of the United States.

"5. The Court erred in refusing to hold that the claims and assertions of the defendants, with respect to the character and effect of their acquisition and use of the parcels of land and water rights set forth in the bill, and with respect to the right of the plaintiff to condemn or appropriate said lands and water rights, constitute a cloud upon the plaintiff's title to its said contract, grant and franchise, and that by reason of said claims and assertions being made under an assertion of power from the State and under color of authority of State laws, the placing of said cloud upon the plaintiff's title constitutes an impairment of its contract and a taking of its property in violation of Section 10 of Article I of the Constitution of the United States and of the due process clause of the Fourteenth Amendment thereto.

"6. The Court erred in refusing to hold that the plaintiff had, and has, all the rights, titles, privileges, powers and franchises set forth in the bill, and in refusing to hold that the acts and proceedings of the defendants complained of in the bill constitute such a material interference with the plaintiff's title, possession, use and enjoyment of said rights, titles, privileges, powers and franchises as entitles the plaintiff to the equitable relief prayed for in the bill.

"7. The Court erred in holding that any of the corporate rights of the defendant, the Northern Ohio Traction and Light Company, the exercise of which is complained

of in the bill, were acquired earlier than the date of the incorporation of the plaintiff."

POINT I

The plaintiff has an indefeasible property right to proceed with its development according to the plan adopted by its board of directors, and a correlative right to exclude rival companies from the lands of its choice.

In *Sears v. Akron,* 246 U. S., 242, 248, this Court held that the contract right created by the incorporation of the plaintiff was not illegally impaired by an ordinance under which the City of Akron was diverting the waters of the Cuyahoga River because there was no contract by the State *with reference to the water rights.* "Incorporation" it said, "did not imply an agreement that the quantity of water available for development by the company would not be diminished. * * * The so-called charter simply conferred upon the company the power to take the lands necessary for, and to construct thereon, the dams, locks, and other parts of its plant"; and the Act of 1911, under which the city proceeded, was treated as an amendment to the company's charter making its rights subject to those of the city (pp. 242, 248, 249).

But, as we understand the decision, in that case, the Court expressly left undecided the question here presented as to whether the plaintiff's adoption of its plan of development and its commencement of condemnation proceedings gave it a preferential right as against rival power companies or other municipalities where no exercise of the State's reserved power to amend or repeal is in-

volved. For in the opinion it was expressly stated, at page 250:

> "Plaintiff contends, however, that it became vested with an indefeasible property right to proceed with its development (*a*) when by resolution the board of directors adopted the plan, or (*b*) when condemnation proceedings were begun. *Whether the adoption of a plan by the company would, under the general laws of Ohio, have vested in it such a preferential right as against rival power companies or other municipalities, we have no occasion to consider.* For it is clear that Ohio retained the power as against one of its creatures, to revoke any such right to appropriate property until it had been acted upon by acquiring the property authorized to be taken, *Adirondack Ry Co. v. New York State,* 176 U. S., 335; and the Act of 1911 and the ordinance were both passed before the company had acquired any property. Nor are we called upon to determine to what extent the commencement of the acquisition of needed property in preparation for the power development, or even actual commencement of construction, would have vested in the company the right to complete the development. For the property alleged to be now owned by the company was not acquired by it until after the city's development had been practically completed; and no work of construction has ever been commenced by the company."

In the case at bar, the defendants are not proceeding under any act of the Legislature which

may be treated as an amendment of the plaintiff's charter. There was a suggestion in argument below that the organization of the defendant Northern Ohio Power Company in some way operated as an exercise of the reserved power to amend or repeal the charter, but the suggestion is obviously untenable. The reserved power to repeal can be exercised only by the General Assembly—not by the act of individual incorporators attempting to accept an offer by the State which has been previously accepted by others (See, as decisive, *Northern Ohio Traction & Light Co. v. Ohio*, 245 U. S., 574, 582, 583, 584), and the settled rule is that such an attempt to obtain a grant which conflicts with one already made is itself null and void and *not* a nullification or repeal of the existing grant (10 Cyc., 226).

This case, therefore, squarely presents the question whether a public utility corporation which, by the adoption of plans, surveys, descriptions and resolutions of appropriation, definitely located its proposed improvement upon specifically described parcels of land (See, Bill, Par. Fifth, Rec. p. 2; Resolution, Ex. A, Rec. p. 16), thereby obtains a preferential right to those lands as against rival companies who seek to defeat the first location by purchasing the lands from the owners—in other words, whether or not, as againts its rivals, the company is entitled to protection as soon as its location is complete. The question frequently has arisen before and it has been uniformly decided in the affirmative, even in jurisdictions where payment of compensation is a condition precedent to the acquisition of title as against the owner of the soil, and even where the rival company has sought to defeat the right of the first locator by purchasing the land from the private owner.

For secondary authorities see:

33 *Cyc.*, 111, 127, 138, 139;
Lewis on Eminent Domain, Secs. 503, 504;
Elliat on Railroads, Secs. 921, 927.

In the first mentioned it is said (pp. 138, 139):

> "*The institution of condemnation proceedings or acquisition of title to the property is not essential to a location, and where priority of right has been secured by priority of location it cannot be defeated by a rival company agreeing with the owners and purchasing the property*, or instituting condemnation proceedings in advance of such proceedings by the company first completing its location, *for while the location does not give title as against the land owner, it fixes the prior right as between companies to acquire such title.*"

In *Denver & Rio Grande R. R. Co. v. Arizona & Colorado R. R. Co.*, 233 U. S., 601, this Court affirmed a judgment enjoining the appellant company from interfering with the located line of the appellee, although, as appears from the record and briefs filed in this court, the appellant had purchased the land and constructed its road at a cost of over $800,000 and the appellee, on the other hand, had done nothing more than locate its line. The court stated that it saw no sufficient reason

> "for reversing the decision of the local Court that *a company is entitled to protection as soon as its final location is complete.*"

In *Sioux City, etc., Co. v. Chicago, etc., Co.*, 27 Fed., 770, which is a frequently cited and uni-

formly approved case, the complainant had purchased the land from the owner and sought to prevent the defendant from acquiring it. The defendant showed however that it had located its line before the complainant purchased, and for that reason it was held to have a better right to the land. The opinion of Judge SHIRAS is peculiarly appropriate because of the view taken below that no rights are acquired until the title of the owner of the soil is acquired and paid for:

> "On part of the complainant, it is argued that the conveyances to it give it the absolute title to the right of way, because, when they were executed, the defendant company *had not paid the damages to the owners of the land;* that payment is necessary, under the statutes of Iowa, to create a right in the railway company as against the owner of the land; and that until payment is made the owner's control over his property is absolute, and he can convey the same, or a right of way over the same, to to any railway company. * * * *The company does not perfect its right to the use of the land, as against the owner thereof, until it has paid the damages, but, as against a railroad company, it may have a prior right and better equity.* The right to the use of the right of way is a public, not a private, right. It is, in fact, a grant from the State, and *although the payment of the damages to the owner is a necessary prerequisite, the State may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement.* The owner cannot, by conveying the right of way to A, there-

by prevent the State from granting the right to B. *All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the State has the control over the right of way, and can, by statute, prescribe when, and by what acts, the right thereto shall vest,* and also what shall constitute an abandonment of such right."

* * * * *

"The injustice and injury to private and public rights alike, which would arise, were it held that, after a company has duly surveyed and located its line of railway, and is in good faith preparing to carry forward the construction of its road, some other company may, by private purchase, procure the right of way over parts of the located line, and either prevent the construction of the road, or extort a heavy and exorbitant payment from the company first locating its line, as a condition to the right to build the same as originally located, are strong reasons for holding that the first location, if made in good faith, and followed up within a reasonable time, may confer the prior right, even though a rival company may have secured the conveyance of the right of way by purchase from the property owners after the location, but before the application to the Sheriff for the appointment of commissioners."

* * * * *

"If it be true that complainant, by making the purchase of the realty over which the defendant's line is located, has the right to prevent the completion of the road, then

> it would be in the power of any company to prevent the construction of the competing lines by simply purchasing portions of the realty over which the line is located and placing thereon its own track."

In *Chesapeake & Ohio Ry. Co. v. Deepwater Ry. Co.*, 57 W Va., 641, 50 S. E., 890, the highest Court of that State examined the question fully upon principle, and also reviewed a large number of the authorities, and then said (57 W. Va., 666):

> "This review of the authorities clearly, establishes the following principles: First, When the statute does not make the filing of a map or plat of a railroad location a prerequisite to the adoption of it, an appropriation of it may be made without the filling of such maps. Second. *The beginning of condemnation proceedings against the land owner is not a prerequisite to the acquisition of a right of way against third persons and rival companies.* Third. A mere survey made by the engineers of the railroad company, not adopted or determined upon by the corporation itself through its Board of Directors, or otherwise, as the location of the route does not amount to an appropriation, giving priority of right as against third persons. Fourth. A survey staked out upon the ground as a center line, a preliminary line, or as an actual location, whether delineated on paper or not, if adopted by the corporation, as aforesaid, is a location within the meaning of the statute, and *the company first making such location has a right to it superior*

to that of any other company. Fifth. A survey made by promoters of a railroad corporation for its purposes before the company is organized, or by an existing corporation for an extension of its road, before filing in the office of the Secretary of State a certificate of extension, may be adopted after incorporation or the filing of the certificate, as the case may be. Sixth. A location of a line, contemplated by original articles of incorporation, cannot be made before incorporation, nor can the location of a line contemplated by an extension be made before the certificate of extension has been filed as required by law. Seventh. A railway company may begin the work of location on any part of its contemplated route, and *a location of a part only of its road, may be held against a rival company, seeking the same location, as long as such locating company manifests good faith by the diligent prosecution of the work contemplated by its organization.*"

In *Williamsport & North Branch R. Co. v. Philadelphia & Erie R. Co.*, 141 Pa. St., 407, 12 L. R. A., 220, which is everywhere recognized as a leading case, it was held that a railroad is located, so as to exclude the appropriation of the land selected by other persons, *when a definite location has been adopted by the action of the company.* The successive steps necessary to acquire title to a roadway were stated to be, *first*, a preliminary entry on the lands of private owners for the purpose of exploration; *second*, a selection and adoption of a line by the directors of the company;

third, payment of compensations to the owner. The court then said:

> "The title of the owner is not divested until the last of these steps has been taken.
> • • •
>
> "As against him the corporation can acquire only a conditional title by its act of location, which ripens into an absolute one upon making compensation. *As to third persons and rival corporations, however, the action of the company adopting a definite location is enough to give title.* For this reason in several of the United States provision is made by law for recording the action of the company and the line adopted by it, so as to give notice to the public, and to settle questions of priority of title. We have no such statute and the action of the company must be proved by other competent evidence. *Heise v. Pennsylvania R. Co.*, 62 Pa., 72. *But when proved it has the same effect upon all interested as though it had been recorded.* It settles the date of actual appropriation, and shows the exact location of the line of the road proposed."

The case of *Rochester, Hornellsville and Lackawanna R. R. Co., v. New York, Lake Erie & Western R. R. Co.*, 44 Hun, 206; 110 N. Y., 128, is so exceedingly pertinent upon its facts and contains such a complete discussion of the principles involved that we beg to direct special attention to the opinions of both of the Supreme Court and the Court of Appeals. In that case a railroad company, which had located its line, *but had not acquired the title of the private owner or even com-*

menced a condemnation proceeding for that purpose, sought to enjoin another railroad company from constructing or operating its road upon the located line; and it obtained such injunction *even though the defendant had obtained a lease of the land from the private owner and had taken possession under such lease.*

In *Suburban Rapid Transit Co. v. Mayor, etc.,* 128 N. Y., 510, the New York Court of Appeals applied the same principle to an attempt by a city, under authority from the State, to take for park purposes a strip of land adopted as a railroad route though the railroad company had not yet acquired title to the land by condemnation proceedings. The opinion in that case is likewise emphatic in upholding the principle for which we contend, and we beg to direct special attention to it.

In *Nicomen Boom Co. v. North Shore Boom Co.,* 40 Wash., 315; 82 Pac., 412, the Supreme Court of Washington, applying the principles of the cases already cited, sustained the right of one boom company to enjoin another from constructing a boom within the limits of the territory included in the plat and survey filed by the plaintiff as showing the shore lines, lands, and waters it proposed to appropriate for its corporate purposes. The Court said (p. 325):

> "Under legislative schemes for the location of railroad lines which are initiated by the filing of plats of location, it is held that compliance with the law in that particular secures to the locating company the right to construct and operate a railroad upon such line, exclusive in that respect, as to all other railroad corporations, and free from the interference of any party. *The*

right to locate its line of road in the place of its selection is delegated to the corporation by the sovereign power. The further right to subsequently acquire, *in invitum*, the right of way and necessary lands for operation of the road from the land owners is likewise delegated. *The source of the franchise is in the sovereign power, which power confers the franchise upon the corporation as its delegated representative,* and the grant is for the public, and not for private, purposes. * * * It is further held that, when a franchise has been thus conferred, no other railroad company may acquire title to the lands within such a location, or construct a road thereon, to the exclusion of the right of the first locating company to acquire such title *in invitum*, and to construct its road upon the lands. Injunction has also been adopted as the proper remedy to prevent such interference."

In *Barre R. R. Co. v. Railroad Companies*, 61 Vt. 1; 12 Alt. 923; 15 Am. St. Rep. 877; 4 L. R. A. 785, the controversy was between two companies designated by the Court as Barre Company and Granite Company. The Granite Company was organized on April 9, and it adopted a survey of its proposed road and caused the same to be filed on the same day. At that time the owner of the land in dispute had contracted to convey the land to the Barre Company and on April 10th he gave the Barre Company a deed for the land. It was contended, just as it is contended in the case at bar, that even if the Barre Campany's purchase be regarded as subsequent to the adoption of the location, it yet gave that company the better right to

the land, because in any event the purchase was made *"before the Granite Company had paid or deposited the land damages and so became entitled under the statute to the seizin and possession of the land."* The Court held, however, that the Granite Company had the better right. It quoted from the case of *Rochester H., L. & R. Co. v. New York, L. E. & W. R. Co.*, 110 N. Y. 128, as upholding the right of the company making the first location, and then said:

> "The decisions in New Jersey and Pennsylvania and other states have been the same. *Indeed I have not found, and do not think there is a judicial decision or utterance to the contrary."*

The Court further held that the fact that the owner of the land had previously made an unrecorded contract to convey to the Barre Company did not affect the case.

In *Fayetteville St. Ry. Co. v. Aberdeen R. R. Co.*, 142 N. C. 423; 55 S. E. 345; 9 Ann. Cas. 683, the company which first adopted a location *by resolution of its board of directors* was held to have a prior right to the route in controversy as against a rival company which *actually purchased the land from the owners after the adoption of the resolution of location but before the institution of a condemnation proceeding.* The Court said:

> "On this question the authorities are to the effect that where the grants are indefinite, leaving the exact route to be selected by the company, the prior right will attach to that company which *first locates the line:* and, in the absence of statutory regulations to the contrary, the first location belongs to that company which first defines and marks

> its route and *adopts the same for its permanent location by authoritative corporate action. Lewis on Eminent Domain,* vol. 2, sec. 366; *Railway v. Railway,* 141 Pa. St., 407; *Railway v. Railway,* 159 Pa. St., 331; *Johnston, Childs et als., exrs., v. Callery,* 184 Pa. St., 146; *Railway v. Blair et al.,* 9 N. J. Eq., 635; *Railway v. Railway,* 110 Fed. Rep., 879."

And also:

> "In some of the authorities supporting this position it is stated as one of the requirements that the route, or line, after being surveyed, shall be platted and returned to the general offices of the company, and there approved as stated; and in others, that such survey and plats shall be filed in some public office and there recorded. But this will, no doubt, be found, on examination, to be on account of some public statute or provision of the charter, and is *not an incident of a completed location,* as a general proposition. There is no such statute with us."

These cases but reiterate the rules stated in many other cases, but we have quoted from them in order to bring sharply to the mind of the Court that from all the cases it is apparent that *neither the absence of a statute requiring the filing of a map nor the existence of a provision that the title of the private owner cannot be acquired in advance of actual payment of his compensation, affords any reason for holding that the doctrine that priority of location gives priority of right does not prevail in Ohio.* The cases clearly recognize that the private owner is not deprived of his rights

without the payment of compensation, and they point out how and why the doctrine does not infringe the constitutional rights of such owner.

Furthermore, the doctrine has been expressly recognized in Ohio. In *Ohio Southern R. R. Co. v. Cincinnati, Hamilton & Dayton R. R. Co.*, an unreported decision of the Court of Common Pleas of Jackson County, the pleadings and judgment in which we herewith furnish to the Court, the Ohio Southern Railroad Company sought to enjoin the Cincinnati, Hamilton & Dayton R. R. Co. "from disturbing *the survey, location, and designating marks* thereon and from laying its tracks and constructing a railroad over" certain premises described in its petition, *which premises the plaintiff company did not own by virtue of any purchase or condemnation proceeding.* The petition alleged that the defendant company, "having actual knowledge of *plaintiff's location and survey*" and "for the sole purpose of hindering plaintiff in its attempt to condemn," had obtained possession of the land in question and was engaged in constructing a switch thereon "upon and over *plaintiff's location.*" The defendant answered that the owner of the land in question had conveyed the same to the defendant by good and sufficient warranty deed and that defendant had paid such owner the full consideration therefor. The plaintiff replied that if the defendant had purchased the land in question it had done so "well knowing that plaintiff had *located its line* as aforesaid." Upon these pleadings the court found "the facts set forth in the petition of plaintiff to be true," and thereupon perpetually enjoined the defendant "from disturbing *the survey, location, and designating marks thereon* and from

laying its tracks and constructing a railroad upon the premises named in the petition of plaintiff." It appears from the Certificate of the Clerk attached to the pleadings and judgment that an appeal was taken by the defendant, but that the same was thereafter dismissed for want of prosecution.

Although no opinion was written in the case to which we have just called attention, the precise question of whether the *location of a route without purchase or condemnation of the land* gave to the locating company a right to resist interference with the line by another corporation that had stepped in and purchased the land from the owner, was *directly involved* and was *decided.* It is also worth while and not improper to note that one of the counsel for the plaintiff in that case was the present Judge JONES of the Ohio Supreme Court.

In some of the earlier arguments in this litigation it has been asserted that the cases of

> *Adirondack Ry. Co. v. New York,* 176 U. S., 335; affirming 160 N. Y. 225;
> *Underground R. R. v. New York,* 193 U. S. 416; and
> *Ramapo Water Co. v. New York,* 236 U. S., 579;

are opposed to our contention.

A slight examination of those cases will show that statement to be wholly unfounded.

In the *Underground Railroad case,* relief was denied because of the fact, clearly stated by this court in 193 U. S. at p. 429:

> "The consent of the municipal authorities and the consent of the abutting owners, or the substituted consent of the Supreme

> Court, were essential to the right to construct a railroad, and these it never obtained."

The company in that case could not demand the consents as a matter of right and could not acquire then *in invitum,* and yet its right to construct its road was expressly made dependent upon its obtaining them. Hence, in that case the company *did not have a complete grant.* It had never obtained a *right* to construct its road.

The *Adirondack case,* so far from being opposed to our claims clearly sustains them, for in that case it was said (160 N. Y. 246, approved 176 U. S. 346):

> "The effect of the map when filed was to *give warning to other railroads that a certain route had been pre-empted by the defendant.* It established no right against the owner, because the Constitution forbids it; it established none against the State, because its power is paramount, *but as against all other railroad companies and as against* ALL OTHER CREATURES OF THE STATE, *empowered to use the right of eminent domain, it gave the exclusive right to occupy the particular strip of land* for railroad purposes until the Legislature authorized it to be devoted to some other public use."

The *Ramapo case* likewise sustains our position, for while relief was denied in that case because the charter had been repealed by the Legislature and because that company *had not completed its location* by serving notices upon the landowners as required by the statute, this court expressly said (236 U. S. 584):

> "We appreciate the argument that although the corporation may have had no lien on the land or right as against the sovereign power, *it had a right as against* ALL SUBORDINATE BODIES *to exclude them from the lands of its choice.*"

Furthermore, we call attention to the fact that, since the *Adirondack* and *Ramapo* cases were decided, the Court of Appeals of New York (in which State each of these cases arose) has again passed upon the question in *Matter of City of New York* (*Newport Avenue*), 218 N. Y. 274, and that it there clearly stated that the doctrine that priority of location gives priority of right, "has *always* been applied in controversies between rival railroads" and is also "the rule in controversies between a railroad and a city."

As opposed to this array of authorities, we have the declaration of Mr. Justice CLARKE, as District Judge, in *Sears v. Akron*, where, without impugning or criticising the soundness of the views expressed in the cases we have cited, he stated that the doctrine they announce does not prevail in Ohio. His opinion may be found in the printed record of *Sears v. Akron* now on file in this court. In it, he said:

> "In Ohio the declaration upon the private records of a corporation of an intention to construct an improvement upon or over any lands without further action taken, or payment made does not give to the plaintiff any title or right whatever legal or equitable in the lands embraced within such paper scheme. This is distinctly the settled law of Ohio, and the best expression of it is, I think, to be found in the case of *Columbus*

etc., Co. v. T. & O. C. Ry. Co., 32 W. L. B. 186. This is a Common Pleas Court decision, but it is well worked out and the absence of decision by higher courts on a question which must have frequently arisen is of itself confirmatory of its authority as an expression of the accepted law of the State. The Court says:

" ' But the grant, by articles of incorporation to a railroad company of a right to construct a road is afloat; it attaches to no specific lands until the line of the road is sufficiently fixed by purchase of the land, or by condemnation proceedings and acceptance of the land condemned. Even after the land is condemned, the Railroad Company may elect not to pay the price and accept the land. The fact that Railroad Company has surveyed and staked a line upon certain grounds does not conclude it, why then should it conclude anybody else? The company may survey and stake more than one line and by comparing the cost and advantages of each of them, determine upon which it will build, but the line is not definitely established until the land is condemned, paid for or accepted, or purchased by agreement'."

"So in *State of Ohio ex rel. v. Cincinnati*, 17 O. S. 103, the Court states what is well known to this Court to be the opinion of the profession of the State that 'no appropriation of lands of the relators could be completed, no title from them could be acquired and no incumbrance could be imposed on their estate by the railroad company, until the amount of compensation fixed by the

findings of the jury was paid in money or secured to be paid by a deposit in money.'

"The plaintiff has no power of eminent domain greater or other than a railroad company has. In the State of Ohio there is not now and never has been any statute requiring a corporation desiring to exercise the right of eminent domain to file in any public office a map or survey of the route or plan of the improvement adopted by the company, so that the rule that land owners or other corporations are in any wise estopped or their property encumbered by the mere private resolution of a company possessing the power of eminent domain has never prevailed in this State as it has in some other States."

We recognize to the fullest extent the rule in Ohio that the private owner cannot be deprived of his title or possession until his compensation has been assessed and paid, and that prior to that time no eminent domain corporation acquires the title of the private owner or any right to exclude him from his land. We do not at all dispute *State ex rel. v. Cincinnati*, 17 Ohio St., 103, or *Wagner v. Railroad Co.*, 38 Ohio St. 32, cited by the Court below. *We are not claiming the title of the private owner.* What we claim is what has been granted by the State—the *right or franchise to acquire the title of the private owner* by fixing and paying the compensation, *free from the interference of third persons.* And as was aptly said in *Sioux City &c., Co. v. Chicago &c., Co., supra,* which arose under statutes identical with the statutes of Ohio requiring the advance payment of compensation to the owner:

> "Although the payment of the damages to the owner is a necessary prerequisite, the State may define who shall have the prior right to pay the damages to the owner, and thereby acquire a perfected right to the easement. * * * All that the owner can demand is that his damages shall be paid, and, subject to the right of compensation to the owner, the State has the control over the right of way and can, by statute, prescribe when, and by what acts, the right thereto shall vest."

Our contention—the ultimate basis of the cases upon which we rely—is that in adopting its location the corporation is exercising the power of eminent domain granted to it by the State, to the exercise of which power the title of the private owner is always subject. When, therefore, a corporation, acting pursuant to statutory authority from the State, resolves to acquire certain land for a public use, it does not "estop" the landowners or place any "incumbrance" upon their property. The land was *always* liable to an exercise of the power of eminent domain (*Long Island Water Supply Co., v. Brooklyn*, 166 U. S. 685), or, as stated in the Ohio Constitution, the owner's title was *always "subservient* to the public welfare" (Art. 1, Sec. 19). The power of eminent domain "constitutes a condition upon which all property is holden" (*Kramer v. Cleveland & Pittsburg R. R. Co.*, 5 Ohio St. 140, 146). It is an inseparable incident of sovereignty which may be exercised at any time either directly by the State or indiretly by such agency as it may select, including "the instrumentality of private individuals incorporated for the pur-

pose" (*Giesy v. Cincinnati, W. & Z R. R. Co.*, 4 Ohio St. 308).

If the use be public (and that has been adjudicated in this case by *White v. Little Miami Light, Heat & Power Co.*, 77 Ohio St. 633, and also by *Mt. Vernon Cotton Co. v. Alabama Power Co.*, 240 U. S. 30), the landowner cannot defeat or prevent a taking of his land. His only right is to receive compensation. If the State of Ohio had specifically declared in some legislative enactment that it was necessary in order to carry out a stated public purpose to acquire certain specifically described parcels of land and that the State "does hereby appropriate and condemn each and all of the following described real property and estate for the uses and purposes aforesaid," no one would contend that the landowner could defeat the State's declared purpose by conveying the land to a railroad company or to a municipality, or that any third person could thereafter appropriate the land to an inconsistent use. The situation is not different merely because in this instance the State, instead of acting directly, has chosen to act through "the instrumentality of private individuals incorporated for the purpose." And no one having the slighest knowledge or regard for the fundamental principles of eminent domain should have any hesitancy in accepting the claim that when these "individuals incorporated for the purpose" have made a similar resolution, their absolute right to acquire the legal title to the soil by assessing and paying the compensation cannot be impeded or impaired by the act of the private owner in making a subsequent conveyance or by the acts of third parties in attempting to use the land for an inconsistent purpose.

This is the simple proposition upon which we rely, and it is a proposition which has been accepted and acted upon by every court to which it has been presented, save the Court below.

We say "save the Court below" advisedly, for while the opinion in the case of *Columbus, etc. Co. v. Toledo, etc., Ry. Co.*, 32 Weekly Law Bulletin, 186; 1 Ohio Decisions, 627, contains *dicta* at variance with every case that has ever been decided upon the subject, the actual *decision* fully sustains the rights of the plaintiff under the facts here presented. That was a suit to enjoin the prosecution of a proceeding in the Probate Court for the acquisition of a parcel of land which was included in the plaintiff's line of route as surveyed. The defendant had commenced *but not completed* its condemnation proceeding, *and it was held to have a right to the land prior and superior to a company which had not purchased or commenced a condemnation proceeding.* The actual decision of the Court, as stated in the syllabus, was as follows:

> "The franchise granted to a railroad company by its incorporation *conferred the right to select for itself the precise line on which the road is to be built* between the terminal points fixed by the incorporation; but its selection of the line by surveying it, and setting stakes, in the absence of a purchase or condemnation of the land, did not bestow upon it a right to the land covered by the line which is exclusive as to another railroad company that subsequently surveyed and staked the same line, *but first began condemnation proceedings to have it appropriated for its purposes.*"

The case thus clearly recognizes the charter as a grant of a franchise by the State, which includes, as an essential element, the right to select the precise lands to be acquired, and it accorded priority of right to the company which *first commenced condemnation proceedings,* even though the proceedings had not been prosecuted to judgment. The plaintiff in this case stands in the position of the *defendant* in that case, not in the position of the *plaintiff*. It commenced its condemnation proceedings *before* the defendants here had located, purchased or condemned, and the defendants thus acted *pendente lite,* with actual and constructive notice of the plaintiff's rights.

Furthermore, we respectfully submit that the doctrine *must* prevail in Ohio, because to deny the doctrine is to deny the State's sovereign power of eminent domain and make the title of the private owner *paramount* to the public welfare instead of *subservient* to it as expressly declared in the Ohio Constitution.

A brief consideration of what is actually involved in a corporation's selection and location of its route or place will, we believe, conclusively demonstrate this statement.

The theory upon which Judge CLARKE has said that in Ohio a corporate resolution fixing the location of its improvement gives the company no legal or equitable right or title to or against the lands described, is that where, as in that State, the corporation does not have to file any map of the route adopted or place selected it can change its location as often as it sees fit, at least until it has acquired and paid for the land upon which its proposed improvement is to be built, and as the corporation is not until then confined to the route

or place selected it is not until then entitled to hold the route or place as against third parties or rival corporations (See quotation from his opinion at pages *supra*).

This theory, we submit, contains several errors and is not sound.

(a) The filed map is not the location but merely the evidence thereof.

The first error in this theory is the wholly unwarranted effect attributed to the *filing of a map.* Of course if there be a statute requiring the filing of a map the statute must be complied with. But the absence of a statute authorizing or requiring such filing does not destroy the efficacy of a location. This has been expressly decided in many cases (see *Fayetteville, etc. Co. v. Aberdeen, etc. Co.,* 142 N. C., 423; *Williamsport & N. B. R. R. Co. v. Philadelphia & Erie R. Co.,* 141 Pa. 407; 12 L. R. A., 220; *Chespeake & Ohio Ry. Co. v. Deepwater Ry. Co.,* 57 W. Va. 641; *Denver & Rio Grande R. R. Co. v. Colorado & Arizona R. R. Co.,* 233 U. S. 601), and the reason is that neither the map nor the requirement for its filing either makes the location or constitutes the grant which gives the right to locate. The purpose of the map is to place in convenient and accessible form permanent record evidence of the true and exact location and boundaries of the road (see 33 *Cyc.,* 128, and *Williamsport & N. B. R. R. Co. v. Philadelphia & Erie R. Co., supra*). It is not the location itself and any other competent and satisfactory proof of the location is quite as efficacious as the map (*Denver & Rio Grande R. Co. v. Colorado & Arizona R. Co., supra* and *Williamsport* case, *supra.*)

It would, indeed, be very strange and incongruous if the mere failure of the State to provide

a place in which to file a map of the location should defeat the location itself. Paraphrasing the language of this Court in *Tarpey v. Madsen,* 178 U. S., 215, 219, the right of a company which has actually adopted a route or place with an intent to construct its improvement thereon cannot be defeated by the mere lack of a place in which to make a record of its intent.

(*b*) *A change of location cannot be compelled even though the corporation might make a change for itself.*

A second fallacy in the theory is that even if its promise be true—even though the corporation might change its route at will up to the time the land is "condemned, paid for and accepted"—the conclusion is unsound; for it by no means follows that any and every third person is at liberty to make a change for it. The fact that the corporation *may* make a change for itself does not *compel* it to change at the behest and dictation of third persons, and yet this is precisely what the theory just stated really amounts to. The right to change a route implies the right to adopt one, and the right *not* to change it. It does not imply, but negatives the idea, that third parties may compel the company to make a change it does not care to make. It is, indeed, irrelevant to discuss whether the corporation has a right to make a change. The question really is whether it has a right to the place which it originally selects and desires to hold; and that question may well be answered by asking by what authority does the second corporation claim the right to deprive it of that place? Can an answer to that question be framed which does not recognize the right of the prior locator to hold the place?

(*c*) *A location once adopted cannot be changed by the corporation without a further grant of power from the State.*

The theory is further erroneous in its false assumption that the adoption of a location is not final and conclusive and does not "definitely fix" the site or place of the road or other improvement.

Since 1852 the statutes of Ohio, like the statutes of most other States, have provided for the formation of corporations by the filing of articles of incorporation pursuant to general laws, which articles are required to state the *termini* of any proposed improvement which is not to be located at a single place (Ohio Gen. Code, Sec. 8626). When a *railroad corporation* is thus formed it has, by grant from the State, a right "to construct, maintain and operate a railroad between the terminal points named in the articles" (See Ohio Gen. Code, Sec. 8745, which is derived from an act passed in 1852). When a *power company* is thus formed it has, by like grant, a right to construct, maintain and operate its plant and enter upon, survey, and appropriate all lands necessary therefor (*Id.,* Secs. 10,128—10,134). It is well settled that such a grant gives to the company *the power to locate* between the terminal points mentioned *and a discretion as to the exact place to be adopted* (*Callender v. Painesville, R. R. Co.,* 11 Ohio St. 424; *Walker v. Mad River R. R. Co.,* 8 Ohio, 38). We agree that merely surveying and staking a line does not amount to a location or conclude the corporation. That work is merely preliminary and experimental and is performed by the company's engineers. To constitute a *location* the survey must then be *adopted* by the company, acting through its Board of Directors.

in whom is vested the power to "locate and construct the road" and who may, of course, choose and select which survey of several they will adopt.*

But when the board of directors has thus adopted the route or place where the improvement is to be built, the indefinite or distributive or floating grant of the right to construct the improvement between the specified *termini* over such a line of route as it may select, has become definite and precise and attached to the specific lands covered by the resolution; and it has been twice squarely held by the Ohio Supreme Court that the *permanent location* is then made.

Chamberlain v. Painesville & Hudson R. R. Co., 15 Ohio St., 225.

Ashtabula etc. Co. v. Smith, 15 Ohio St., 328, 335.

Each of the cases just cited was an action upon a subscription for stock of a railroad company

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*In a number of cases the Supreme Courwt of Ohio has said that the powers of a corporation fall into two classes—such as may be exercised before and such as cannot be until after the election of directors. "Among the former," it is said, "is the right to receive subscriptions to the capital stock and the election of directors; and among the latter is the location and construction of the proposed road * * * The condemnation of land for the construction of the road comes within the powers to be exercised by the corporation through its directors." **Powers** v. **Railroad Co.**, 33 Ohio St., 429; **Ashtabula, &c., R. Co.** v. **Smith**, 15 Ohio St., 328; **State ex rel.** v. **Insurance Co.**, 49 Ohio St., 504, 524.

The difference between the preliminary survey by the engineers and the adoption of the route by the directors is recognized in all the cases (see particularly **Williamsport & N. B. R. R. Co.** v. **Philadelphia & Erie R. R. Co.**, 141 Pa., 407, and **Chesapeake & Ohio Ry. Co.** v. **Deepwater Ry. Co.**, 57 W. Va., 641). The engineers survey, but they cannot bind the corporation. They simply report their work to their superiors.

which was made upon condition that the road be *located* at a particular place. In each case it was contended that the condition was not complied with because the road had not yet been *constructed* on the designated route, and in each case the contention was rejected. In the case last cited the only showing made with respect to the location of the road was the averment of the petition that *upon a specified date* "the Board of Directors of the plaintiff did cause to be surveyed and *did locate* the railroad," and this was held sufficient, the Court saying (p. 335):

> "The language in question, *is used to designate the line, or route, upon which the road was to be constructed,* and the averments in the petition, in our opinion, show a compliance, on the part of the plaintiff, with all that can be fairly required."

Here, therefore, are two authoritative decisions of the Supreme Court of the State that the *location of the road is made by the act of the directors of the corporation in adopting a resolution fixing the place where the road is to be constructed, and that a location so made is conclusive and binding.* The latter proposition is necessarily involved in the decisions because otherwise the condition of the subscriptions that the road be *located* at a particular place would not have been fulfilled.

Moreover, does the right to select the route imply the right to select several routes? May the directors adopt and abandon routes at will, or does the adoption of one route exhaust their power? When it is remembered that in exercising this power of location the directors are acting pursuant to a grant of sovereign power from the

State—a grant which it is always recognized must be strictly construed—the answer to these questions is obvious. And so it has been repeatedly adjudicated, in Ohio as elsewhere, that *when a company has definitely adopted a particular location for its road it cannot change it without legislative authority.*

> *Moorhead v. Little Miami R. R. Co.*, 17 Ohio, 340.
> *Little Miami R. R. Co. v. Naylor*, 2 Ohio St., 235.
> *Works v. Junction R. R. Co.*, 5 McLean, 425, Federal Case No. 18046, per Mr. Justice McLEAN.

As was said in *Erie Railroad Co. v. Stewart*, 170 N. Y., 172, 179:

> "When the company had located its line of road between its terminal points, pursuant to the requirement of its charter, it was concluded by that location and no change of its route could thereafter be made, in the absence of legislative authority. *The effect of the designation by the directors of the line of the road was the same as if the line had been described in charter and the operation by the corporation of a railway limited thereto.*"

The same principle was applied in the earlier case of *Matter of Poughkeepsie Bridge Co.*, 108 N. Y., 483, which is peculiarly appropriate because it is based upon the authority of the Ohio cases cited above. Thus, at page 493, the Court said:

> "This, we think, exhausted its power of choice and the location so made was final and could not be changed in the absence of

> legislative authority. This view is supported by judicial opinions and decisions. (*H. & D. Canal Co. v. N. Y. & E. R. R. Co.*, 9 Paige, 323; *Mason v. Brooklyn City & N. R. R. Co.*, 35 Barb., 381; *Moorehead v. Little M. R. R. Co.*, 17 Ohio, 349; *Same v. Naylor*, 2 Ohio St., 235.)"

That these New York cases correctly interpret the Ohio decisions is clearly shown by the fact that in *Little Miami R. R. Co. v. Naylor, supra,* the Ohio Court said:

> "The strip of country, from which the road may select its tracks, is frequently several miles in width. This extent of country is not all appropriated to the use of the road, but only so much as may be necessary for a track; its right to it is simply one of selection, *and when it has made its selection, its rights over all the other territory ceases.*"

The existing *statutes* of Ohio afford a further and conclusive proof that the accepted law of that State is that a location once made by the directors cannot be changed without explicit authority from the Legislature. For it has been found necessary in that State to pass three separate acts permitting railroads to change their locations; and those statutes permit such changes only to a limited extent and only for certain specified reasons.

The first act was passed in 1848, and, with some changes, it became Section 3277 of the Revised Statutes, now Section 8753 of the General Code.*

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*See Act of February 11, 1848, 46 Ohio Laws, 44, Section 10; Act of May 1, 1852, 50 Ohio Laws, 276, Section 11; Act of April 5, 1866, 63 Ohio Laws, 141, Section 11; Act of March 8, 1865, 62 Ohio Laws, 36.

The second act was passed in 1871 and became Section 3275 of the Revised Statutes, now Section 8750 of the General Code.† The third act was passed in 1876 and became Section 3272 of the Revised Statues, now Section 8747 of the General Code.‡

Section 8753 authorizes a change of location or grade "for the purpose of avoiding annoyance to public travel or dangerous or difficult curves or grades or unsafe or unsubstantial grounds or foundations, or when the roadbed has been injured or destroyed by the current of a river, watercourse, or other unavoidable or reasonable cause," but it further provides that the company "shall not depart from the general route prescribed in the articles of incorporation."

Section 8750 provides that when a company, "the line of whose road has not been finally located in whole or in part, finds it necessary, in order to avoid dangerous or difficult curves, grades or dangerous or unsubstantial grounds, or foundations, or for other reasonable cause, to pass through a county not named in the articles of incorporation, or to avoid passing into or through a county named therein, other than a county in which a terminus of the road has been fixed by its articles of incorporation or in which is located a point or place by or through which the line of such road is to pass," *a certificate of such facts may be made and filed with the Secretary of State.* It further provides, however, that it shall not be construed to authorize "the abandonment of any part of the company's line which is finally located, or a change of the general route of the line of such road, or the terminal points named in

†See Act of May 2, 1871, 68 Ohio Laws, 129; Act of March 30, 1874, 71 Ohio Laws, 54.

‡See Act of April 7, 1876, 73 Ohio Laws, 115.

the articles of incorporation." It is, moreover, further provided that when a company's line is diverted from a county named in its articles, *the company shall be liable* to any person owning land in the county *for damages caused by the change* or diversion, and that *all subscribers to the capital stock on the line of that part of the road which is so changed shall be released from all obligation* to pay their subscriptions (§8751).

Section 8747 provides that "*by a resolution adopted by a majority of its board of directors,*" and with the consent of three-fourths in interest of its stockholders, a company "may change the line, or any part thereof, and either of the proposed termini of its road." No change is to be made, however, which will "involve the abandonment of any part of the road, either partly or completely constructed," and any subscription of stock made upon the faith of the location of the road upon a line abandoned by the change shall be cancelled at the written request of the subscriber. Such a change must be described in a resolution under the seal of the company and filed with the Secretary of State (§8748). Any mortgage issued by the company must be recorded in the county in which the changed line is to pass (§8749). It is further provided that when the directors' resolution has been filed the change of location "shall be considered as made and be *as valid and binding as if the changed line had been the line originally described in the articles* (Sec. 8748).

These statutes clearly recognize that when the line is once adopted it cannot be changed by the company *except as authorized by statute,* or, in other words, without the consent of the State or a further grant of power from the State. The "ac-

cepted law of the State" thus is that the adoption of a location *does* conclude the corporation, and even when it obtains a grant of power from the State to make a change it is still liable for the damages caused by the change, and subscriptions made upon the faith of the original location are cancelled.

It is vitally important, too, to note that the change is to be made *by a resolution of the board of directors and that when so made it is as valid and binding as if the changed line had been described in the articles of incorporation.* The plain meaning is that the route or *place* or *location* described in the articles is valid and binding, which is but another way of saying that when, in accordance with the Ohio statute, the location is stated in the articles, the corporation is entitled to the location so stated.

(d) Location must precede condemnation or purchase of the lands, both as a matter of law and as a matter of practical necessity.

No directors of any corporation can or do go out and purchase lands, hit or miss, without previously adopting a plan and resolving upon the *location* of the improvement to be constructed.

The statutes of Ohio further require that when the corporation attempts to condemn the land necessary for its improvement it shall file a petition containing a "specific description" of the lands to be appropriated (Ohio General Code, §11042), and that in the appropriation proceeding it shall show the necessity for the appropriation (*id.*, §§11042, 11046). Obviously the petition could not be drawn until a definite location had been adopted, for otherwise it could not contain a specific description of the lands to be appro-

priated. It is equally apparent that the company could not show any necessity for any particular parcel of land unless it could show that it had definitely located the place where the improvement is to be constituted. *It is, therefore, both a legal and a practical necessity that final location precede condemnation.* For this reason, if for no other, the idea that the location is not definitely and finally fixed until the land is actually purchased or condemned is obviously erroneous.

(e) *The adoption of the corporate resolution concludes not only the corporation but also the courts and the private owners, save in cases of abuse of power, and the adoption of such resolution is the act which legally subjects the land to the public use.*

The fifth and most fundamental error in the theory stated above is its *failure to recognize that the corporation's adoption of its resolution is an act performed in the exercise of sovereign power delegated to it by the State.* It is in this respect that the theory contradicts the fundamental principles of eminent domain—the subserviency of the private title to the public welfare.

Ohio, like every other state, has always recognized that the power of eminent domain is public, not private; political, not judicial; and is vested in the Legislature, not in the courts or in the individual owners of the soil.

Giesy v. Cincinnati, W & Z. R. R. Co., 4 Ohio St., 308.
Kramer v. Cleveland & Pittsburg R. R. Co., 5 Ohio St., 140, 146.

As already stated, it always exists and may be exercised at any time, either directly or through

the agency of corporations organized for the purpose. Its exercise "can only be restrained by the judiciary when its limits have been exceeded or its authority has been abused or perverted" (*Kramer v. Cleveland & Pittsburg R. R. Co., supra*) and "IT REQUIRES NO JUDICIAL CONDEMNATION TO SUBJECT PRIVATE PROPERTY TO PUBLIC USES" (*idem*, p. 146).

It is, furthermore, an established rule, which we know will not be questioned by the defendants in this case, that "it is not upon the question of appropriation of lands for a public use, but upon that of compensation for lands so appropriated that the owner is entitled to a hearing in court and the verdict of a jury."

Zimmerman v. Canfield, 42 Ohio St., 463, 471.

Cuyhoga River Power Co. v. Akron, 210 Fed., 524, 527, per Judge DAY, and cases there cited.

The propriety and necessity for the appropriation are questions committed to the discretion of the agency in which the power of eminent domain is vested.

Geisy v. Cincinnati, W & Z. R. R. Co., supra.

Kramer v. Cleveland & Pittsburg R. R. Co., supra.

Bowersox v. Watson, 20 Ohio St., 496 507.

Cincinnati v. Louisville & Nashville R. R. Co., 223 U. S., 390, where this Court, in a case involving the power of eminent domain in Ohio, said that when the use is public "the propriety or expediency of the appropriation

> cannot be called in question by any other authority."

It is true that under the present statute of Ohio, relative to condemnation proceedings, the necessity for the appropriation must be ascertained by the Court in advance of the impaneling of the jury which is to assess the compensation of the private owner (§11046), but the enactment of this statute did not establish a new condition to the exercise of the power of eminent domain, for the power is founded upon and is always limited by public necessity (*Giesy v. Cincinnati, W. & Z. R. R. Co., supra,* and *Powers v. Railroad Co.,* 33 Ohio St., 429), and the only power of the Court under the statute is to *prevent an abuse of power by the corporation.* The statute does not substitute the opinion of the Court for the opinion of the condemning party or give the Court power to overrule the corporation's discretion in determining the question of necessity where no abuse of power is shown.

> *Wheeling & Lake Erie R. R. Co. v. Toledo Ry. & Ter. Co.,* 72 Ohio St., 368.
> *Bowersox v. Watson,* 20 Ohio St., 496, 507.

It is evident, too, that the determination of the Court upon the preliminary questions specified in the statute does not *create* the right to appropriate or the necessity for the appropriation, but merely *ascertains* and *declares* the *prior existence* of the right and necessity.

When, therefore, the Legislture has vested a corporation with the power of eminent domain and that corporation resolves to exercise the power as against certain lands, neither the landowner, nor the Court, nor any third person, can

deny or defeat the appropriation, save in the exceptional case where the corporation is proceeding in manifest and gross abuse of power, or, in other words, where it is proceeding without any authority at all.

What, then, is the effect of the resolution that the land is necessary and that the corporation "does hereby appropriate and condemn" the land? Clearly there is involved in such resolution a determination of the necessity and an immediate appropriation of the land to the uses of the corporation—not an appropriation in the sense of the acquisition of the title of the private owner, but an appropriation in the usual meaning of the word as a *setting apart* of the land for the use of the corporation, a *subjection of the land to the public use.* For that purpose, as we have already seen, NO JUDICIAL CONDEMNATION IS NECESSARY (*Kramer v. Cleveland & Pittsburg R. R. Co., supra*). The resolution, therefore, is conclusive upon everyone—corporation, court, landowner and third persons—unless, of course, its complete invalidity can be shown by showing an abuse of power. In the absence of such abuse the corporation's own selection of and determination to acquire the land effectually subjects it to its will and sets it apart for its use, precisely the same as if the resolution, instead of being passed by the agent of the State pursuant to its delegated power of eminent domain, had been enacted by the Legislature itself pursuant to its own sovereign power.

In view of these numerous statutes and decisions, which truly express "the settled law of Ohio," we respectfully submit that there can be no escape from the conclusion that the doctrine of priority of location is neither occult nor arbitrary,

nor the product of statutes having no counterpart in Ohio, but that it is, on the contrary, a simple and obvious application of the principles of eminent domain, which are the same in Ohio as in all other states, and is, indeed, a necessary corollary to the existence of the power itself.

Leaving off as we began, the State has delegated to the plaintiff the sovereign power of eminent domain, giving to it a discretion as to the propriety and necessity for its exercise within the limits prescribed by the charter, and the corporation having, in the exercise of its discretion, determined what land is necessary for the purpose for which it is authorized to make appropriations, and having committed no abuse of its power, neither the Courts, nor the landowners, nor third persons can say it nay. Its absolute right to assess and pay the owner's compensation and thus acquire full right to use and possess the lands in question is an inevitable consequence.

In other words, the statutes and decisions make it perfectly clear that the *right of way* of a railroad or other similar corporation *does not consist of the ownership of the soil,* but is exactly what its name implies, *viz: a right to a place,* and is derived, not from individual owners of the land, but from the sovereign; and when it is said that the corporation which first locates its route or place has a prior right to the land covered thereby, it is simply another way of saying that the corporation is entitled to hold the *right of way* granted to it by the sovereign, free from the interference of subsequent grantees. And the *right of way* is specifically protected from appropriation to the use of another corporation by Article 13, Section 5 of the Ohio Constitution, which reads as follows:

> "No *right of way* shall be appropriated to the use of any corporation, until full compensation therefor be first made in money, or first secured by a deposit of money, to the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury of twelve men, in a Court of record, as shall be prescribed by law."

Finally, this conclusion is, from another viewpoint, reinforced and placed beyond the possibility of dispute by the decisions of this Court in cases relating to the respective rights of railroads and homesteaders upon the public lands of the United States under the Right of Way Act of March 3, 1875 (18 Stat., 482; 2 U. S. Comp. Stat., 1916 Sections 4921-4926). By that act Congress granted "the right of way through the public lands of the United States * * * to any railroad company duly organized under the laws of any State or territory * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same." Any company desiring to secure the benefits of the act was required "within twelve months after the *location* of any section of twenty-five miles of its road" to file with the Register of the Land Office a profile of its road and have the same approved by the Secretary of the Interior. It was further provided that "thereafter all lands over which such right of way shall pass shall be disposed of subject to such right of way."

That act has been determined to be a *grant in praesenti* of a *right of way over lands to be thereafter identified,* and although no specific grantee

is named in the act, a railroad company becomes a grantee by filing its articles of incorporation and due proofs of its organization with the Secretary of the Interior, and it then has a right which cannot be taken away.

Noble v. Union River Logging R. R., 147 U. S., 165, 176.

Jamestown, &c., Co. v. Jones, 177 U. S., 125, 130.

See, also, *Rio Grande Ry. v. Stringham*, 239 U. S., 44, 47, where the nature of the right granted is defined, and *Pearsall v. Great Northern Ry.*, 161 U. S., 646, 662, where the *Noble case* is cited as an illustration of the sanctity of corporate grants.

The act is, therefore, in all respects analogous to the grant of a right of way obtained by the adoption of a plan of development by a company under State laws like the statutes of Ohio; and the decisions which have been rendered by this Court upon the question when the right to specifically identified lands becomes vested under that act are in point and controlling here.

In a controversy arising under that act, it was decided that where a road has been actually constructed the company is entitled to hold its right of way as against a settler who subsequently enters upon the land *even though no map of the road has been filed* as required by the statute (*Jamestown &c., R. Co. v. Jones*, 177 U. S., 125, as explained in *Barlow v. Northern Pac. Ry. Co.*, 240 U. S., 484). Later, a controversy arose between a railroad company and "a settler holding a patent of the United States whose right had been initiated *before the construction* of the rail-

road but *after a preliminary survey* which had been made by the railroad as a means of ultimately determining upon what line it would build its road, the stakes of such survey being, at the time the settler initiated his right, across the land in question;" and it was decided "that *as a mere preliminary step for the purpose of determining where the road should be located was not in and of itself the equivalent of a definite location* of the line and a permanent appropriation of the right of way, the case was not governed by the rule in the *Jones* case and the right of the settler was paramount" (*Minneapolis, &c., Ry. Co. v. Doughty*, 208 U. S., 251, as explained in *Barlow v. Northern Pac. Ry. Co., supra*). Still later, in the case of *Barlow v. Northern Pac. Ry. Co., supra*, a controversy arose between a railroad and a settler who entered upon the land under the pre-emption laws of the United States at a time when the land had been graded for a railroad but *when no railroad had been actually constructed and no map or profile of the road had been filed.* It was held that under these facts the *Jones* case was controlling and the right of the railroad was sustained. The opinion is by Mr. Chief Justice WHITE, and in that opinion it was said:

> "That under these facts the Court below was right in holding that the controversy was foreclosed by the ruling in the *Jones* case we think is too clear for anything but statement. The contention that the case is controlled by the *Doughty* and not the *Jones* case because the road was not complete and operating when the entryman initiated his rights although it was then graded and was virtually ready for the ties and rails, if acceded to, would render the stat-

ute inefficacious and dominate the substance of things by the mere shadow. The first, because as it is impossible to conceive of the completion of the road by the placing of ties and the laying of rails without presupposing the prior doing of the work of grading, it would follow that the recognition of the right of an entryman to appropriate adversely to the railroad after the grading had been done and before the laying of the ties and rails would render the performance of the latter useless and would deprive the railroad therefore of all practical power to appropriate. The second, because as pointed out in *Stalker v. Oregon Short Line,* 225 U. S., 242, the decision in the *Jones* case rested not upon the ground that the work of construction had reached the absolutely completed stage so as to enable the road to be operated, but on the fact that the work was of such a character as to mainifest that THE RAILROAD COMPANY HAD EXERCISED ITS JUDGMENT AS TO WHERE ITS LINE WAS TO BE ESTABLISHED and had done such work of construction as 'necessarily fixes the position of the route and consummates the purpose for which the grant of a right of way is given' (p. 150). And it is obvious that this standard when complied with would serve not only to demonstrate the *fixed intention of the railroad* to appropriate, but also to give tangible and indubitable evidence to others of the right of way appropriated, thus preventing injury to innocent persons which might result from their selection of land in ignorance of the fact of its prior

> appropriation. The distinction between the doctrine of the *Jones* case and that of the *Doughty* case is therefore that which necessarily must obtain between permanent work of construction of a railroad on a *line definitely selected and fixed by it,* and *mere tentative work* of surveying done by a railroad for the purpose of enabling the line which it was proposed to construct to be *ultimately selected.*"

Thus, in determining when a grant of a right of way over lands to be thereafter identified becomes fixed, this Court has rejected the extremes of actual construction on the one hand and mere preliminary surveys on the other, and has squarely held that *the determining factor is the company's own exercise of its judgment as to where the line is to be established;* and it has given effect to *the company's own selection* of the specific lands to be used as *definitely fixing* the right of the company to those specific lands, even though the statute under which the grant was made required the filing of a map. It needs but a paraphrase of language, without an iota of change in principle, to make the decision in th *Barlow case* a final and conclusive pronouncement that when the plaintiff adopted its resolution its right to acquire those lands by assessing and paying the compensation of the private owners was *absolutely fixed beyond the possibility of defeat or impairment* by the act of rival companies purchasing the lands from the owners.

POINT II

The plaintiff is entitled to equitable relief as prayed for in the bill.

Upon the argument below the defendants earnestly insisted that the plaintiff has an adequate remedy at law—that its proper and only remedy, if any, is a condemnation proceeding. They further argued that their acts do not constitute a *taking* of any property or right of the plaintiff and hence there was no right to an injunction. The lower Court, while not specifically acceding to those contentions, declared that it did not appear that the plaintiff's operations "are interfered with in any *practical* way by defendant's use of its property" (Rec. p. 38), and that pending the time when the plaintiff should complete a condemnation proceeding it saw no reason why the Traction Company should not be permitted to use the land for power-development purposes (Rec., p. 40). It furthermore distinguished *The Binghamton Bridge,* 3 Wall. 51, and *Hamilton G. & C. Traction Co. v. Hamilton & L. El. Transit Co.,* 69 Ohio St. 402, upon the ground that in those cases the question was "one of *actual and present interference* with the rights of the corporation in the operative enjoyment of the privileges of its charter" (Rec. p. 40).

In short, the Court's view seems to have been that, conceding that the plaintiff had an indefeasible property right to proceed with its development, the acts of the defendants could not constitute an invasion of or interference with that right in any substantial or practical sense until the plaintiff became ready to enter upon the land for purposes of actual construction, and as it could not make such physical entry until it had completed a condemnation proceeding, there was no reason for granting an injunction now.

From a *practical standpoint,* that view is quite erroneous because it loses sight of the practical

difficulties thrown in the plaintiff's way by the very fact that the defendants are using the land for power-development purposes and asserting that such use is a bar to the plaintiff's right to acquire the land for itself. Such use and claim by the defendants interferes, not only with the plaintiff's acquisition of the particular parcels here involved, but, also, with its acquisition of other lands and the taking of the other steps necessary to complete its plan. How can the plaintiff, as a matter of business judgment and common sense, go ahead with the purchase of other lands, the construction of dams, or the purchase of machinery, equipment, or appliances, when it is uncertain as to whether it will be able to obtain the lands here involved, which are an essential part of the enterprise? The Court below criticized the plaintiff because so far it has not done much for the public by way of improving the water power of the river (Rec., p. 38)—quite unmindful of the fact that the cloud which the defendants' acts and claims have cast upon the plaintiff's right to proceed, and which the Court has refused by its decree to remove, is the very cause and reason why the plaintiff has been so far unable to enter upon actual performance of its public functions. It seems inconsistent and rather unfair for the Court thus to criticise the plaintiff for not proceeding and at the same time refuse to give it that protection from interference which alone will enable it to proceed. A clear title is the first requisite of any enterprise; and a reasonable certainty of the right to complete an undertaking is, in a very real and practical sense, the *sine qua non* of its commencement. (Compare, *Northern Ohio Traction & Light Co. v. Ohio,* 245 U. S., 574, at top of page 585). As said

by this Court in another connection, the plaintiff's grant was made and received with the understanding that it is "protected by a contractual right from the moment the grant is accepted and during the course of performance as contemplated as well as after that performance," and "it would be virtually impossible to fulfill the manifest intent of the legislature and to secure the benefits expected to flow from the privileges conferred, if, in the initial stages of the enterprise when the necessary proceedings preliminary to the execution of the proposed work are being taken with due promptness, or when the work is under way" the grant may be interfered with by the acts of third parties (*N. Y. Elec. Lines v. Empire City Subway,* 235 U. S., 179, p. 193). It is idle, therefore, to say that there is no present, actual or practical interference with the plaintiff's operations or with its charter privileges. The interference with the plaintiff's operations caused by the acts of the defendants in this case is just as "practical" and just as "actual and present" as was the interference in *The Binghamton Bridge, supra,* and *Hamilton G. & C. Traction Co. v. Hamilton & L. Electric Transit Co., supra;* and the distinction taken by the lower Court between those cases and this is not real.

From a *legal standpoint,* also, the view entertained by the lower Court and the contentions there urged by the defendants are quite unsound.

Of course we recognize, as already stated, that a private owner of lands desired for a public improvement has the right, under constitution and statutes of Ohio as under the constitution and statutes of many other states, to retain the title and possession of his land until his compensation has been assessed and paid. But that rule does

not affect this case, nor does it deprive the plaintiff of the right to equitable relief, because:

(1) The defendants do *not* hold as private owners. Although, as alleged in the bill, their use of the land is, in law, a *private use* because lacking the legal requisites of a *public use,* they nevertheless assert and claim a public use, hostile to the plaintiff's use, and ground their assertion and claim upon State laws the validity of which is challenged by the bill.

(2) The object of the bill is not to obtain possession as against a private owner in advance of the payment of compensation, but to enjoin *quasi*-public corporations, acting under color of authority of State laws, from taking and interfering with the plaintiff's franchise.

(3) Even if a condemnation proceeding were an adequate remedy (which it is not) it is *available only in the State Court,* and hence is not such a legal remedy as will defeat the plaintiff's right to the relief obtainable in Federal Courts of equity.

The defendants do not stand in the position of a landowner against whom a condemnation proceeding has been commenced and who insists upon holding his land as against the condemning corporation until it has divested his title by payment of his compensation. They are *third persons,* who (subsequent to the accrual of plaintiff's rights and actually subsequent to the commencement of a condemnation proceeding) have entered upon and taken possession of the land, not as a private owner but as the possessors of a rival franchise from the State, and have and are threatening to place upon the land permanent structures for the purpose of generating hydro-electric

power and large mortgage liens having the apparent and ostensible authority and approval of the State Public Utilities Commission. They have *changed the use* of the parcels of land in question and instead of holding as a mere "private owner" are asserting and claiming, under color of authority of State laws and under an assertion of power from the State, that their use of the lands is a *public use* and constitutes a devotion of the lands to a public use and that FOR THAT REASON *the lands cannot be taken or appropriated by the plaintiff.*

This *change of use,* the assertion and exercise of such franchise, the erection and use of these structures, and the placing of these liens upon the land, all under color of the authority and approval of a public commission charged by law with jurisdiction in such matters, are obviously not the acts of mere private owners. The defendants may hold the land until condemned, and may use it for any *private* use they please; but when they attempt to use it for a public use and assert and claim that their use is a public use which defeats the right of the first locator to appropriate it, they invade, take and destroy the franchise of the first locator, the plaintiff. *And it is this invasion, taking and destruction which we here seek to enjoin.*

The plaintiff's grievance, in short, is that while it was proceeding with its condemnation suit the defendants came in as *subsequent purchasers with notice* and devoted the property to an alleged public use and now assert such devotion to an alleged public use as a bar to the plaintiff's right to condemn. This interference with the plaintiff's charter rights is a plain impairment and deprivation; and the only way in

which the impairment and deprivation can be stopped, the only way in which the Constitution can be enforced and made effective and the plaintiff made secure in the enjoyment of its Constitutional rights, is for this Court to *enjoin the interference, i. e.,* the defendants' use of the land for the alleged public use and their assertion and claim that their said use is a bar to the plaintiff's right to condemn.

More succinctly stated, the bill shows the plaintiff's possession of a State-granted franchise against which the defendants have set up a continuous interference under color of authority of State laws, which interference constitutes a cloud upon the plaintiff's title to its franchise and actually operates to destroy all effective use of the franchise; and in consequence thereof the plaintiff seeks an injunction forever restraining the defendants from asserting rights in derogation of the plaintiff's title to and use of its franchise. Continuing injury, removal of cloud on title, irreparable injury, *quia timet,* and other well-known heads of equity jurisdiction amply justify the resort to equity.

It is well settled in Ohio that the invasion of an intangible right or incorporeal hereditament, such as an easement or franchise, is *a taking of property* as much as the physical seizure and occupancy of another's house or bit of soil; and the owner of such easement or franchise is entitled to enjoin its invasion because it is a taking of his property, even though there be no actual entry upon any soil of which the owner of the franchise has or is entitled to actual possession.

Callen v. Electric Light Co., 66 Ohio St. 166, 175, 177, 178;

Schaaf v. Railway Co., 66 Ohio St., 215;
Mansfield v. Balliett, 65 Ohio St. 451;
Hamilton G. & C. Traction Co. v. Hamilton & L. El. Transit Co., 69 Ohio St. 402;
Kiser v. Commissioners, 85 Ohio St. 129.

It is apparent, too, from the facts alleged, that as the defendants purport to act under State statutes, State franchises, and State Utilities Commission orders, their acts are to be regarded as State action so as to make the controversy one involving a Federal question within the jurisdiction of the Federal courts.

Cuyohoga River Power Co. v. Akron, 240 U. S., 462, and cases there cited.

See, also, *Grand Trunk Railway v. Indiana R. R. Com.*, 221 U. S., 400, 403, which establishes that the Commission orders set forth in the bill are to be regarded as laws of the State, and 10 *Cyc.*, 226, and cases there cited, as establishing that the alleged incorporation of the Northern Ohio Power Company is an impairment of the plaintiff's contract.

The jurisdiction of equity to grant such injunctions was established in this court as long ago as the time of the decision in *Osborn v. United States Bank*, 9 Wheat. 738, 841, in which Chief Justice MARSHALL said.

> "The appellants admit, that injunctions are often awarded for the protection of parties in the enjoyment of a franchise; but deny that one has ever been granted in such a case as this. But although the pre-

> cise case may never have occurred, if the same principle applies, the same remedy ought to be afforded. *The interference of the court in this class of cases, has most frequently been to restrain a person from violating an exclusive privilege, by participating in it. But if, instead of a continued participation in the privilege, the attempt be to disable the party from using it, is not the reason for the interference of the court rather strengthened than weakened?* * * * In this, *and many other cases of continuing injuries,* as in the case of repeated ejectments, a court of chancery will interpose. The injury done, by denying to the bank the exercise of its franchise in the State of Ohio, is as difficult to calculate as the injury done by participating in an exclusive privilege."

In the case of *The Binghamton Bridge,* 3 Wall. 51, this Court sustained the right to enjoin a rival corporation upon identically the same grounds that are invoked here. For a statement of that case we adopt the language of the court (pp. 71, 72):

> "The plaintiffs in error brought a suit in equity in the Supreme Court in New York, alleging that they were created a corporation by the legislature of that State, on the first of April, 1808, to erect and maintain a bridge across the Chenango River, at Binghamton, with perpetual succession, the right to take tolls, and a covenant that no other bridge should be built within a distance of two miles either way from their bridge; which was a

grant in the nature of a contract that cannot be impaired. The complaint of the bill is, that notwithstanding the Chenango Bridge Company have faithfully kept their contract with the State, and maintained for a period of nearly fifty years a safe and suitable bridge for the accommodation of the public, the legislature of New York, on the fifth of April, 1855, in plain violation of the contract of the State with them, authorized the defendants to build a bridge across the Chenango River within the prescribed limits, and that *the bridge is built and open for travel.*

"The bill seeks to obtain *a perpetual injunction against the Binghamton Bridge Company, from using or allowing to be used the bridge thus built,* on the sole ground that the statute of the State, which authorizes it, is repugnant to that provision of the Constitution of the United States, which says that no State shall pass any law impairing the obligation of contracts."

That case was approved and made the basis of decision in *New Orleans Gas Co. v. Louisiana Light Co.,* 115 U. S., 650, in which the plaintiff claimed to be entitled, for the term of fifty years from April 1, 1875, to the sole and exclusive privilege of manufacturing and distributing gas in the City of New Orleans. The right rested upon an act of the legislature. Subsequent to the granting of this right the defendant was formed *under a general law* and by an ordinance of the city it was authorized to supply light. The relief asked was a decre perpetually enjoining the defendant from laying its pipes for supplying

gas "*and from asserting any right to do so* until after the lapse of fifty years" from the date of the plaintiff's grant. The lower court sustained a demurrer to the bill, but its decree was here reversed, this Court holding that upon the facts alleged the plaintiff was entitled to an injunction.

The same conclusion was reached in *New Orleans Waterworks Co. v. Rivers,* 115 U. S. 674, which was a bill by a Louisiana corporation to enjoin a citizen of Louisiana from supplying water in the City of New Orleans. Referring to the act authorizing the plaintiff to supply water in the city, the Court said (p. 681):

> "It is as much a contract, within the meaning of the Constitution of the United States, as a grant to a private corporation for a valuable consideration, or in consideration of public services to be rendered by it, of the exclusive right to construct and maintain a railroad within certain lines and between given points, or a bridge over a navigable stream within a prescribed distance above and below a designated point."

The right to an injunction in such cases as the present is recognized, also, in the numerous "location cases" cited in Point I *supra.* In this connection we again call particular attention to the able opinion of BARKER, J., in *Rochester, H. & L. R. R. Co., v. New York, L. E. & W. R. R. Co.,* 44 Hun, 206, and to the opinion of the New York Court of Appeals affirming that decision (110 N. Y., 128).

The right to an injunction in such cases was likewise affirmed by this Court in *Denver & Rio Grande R. R. Co. v. Arizona & Colorado R. R.*

Co., 233 U. S. 601. The opinion by Mr. Justice HOLMES in that case is so concise and disposes of the contentions of the appellant in such summary fashion that the importance of the decision is scarcely grasped at a single reading. We have examined the record and briefs in the case and from them it appears that the Denver & Rio Grande Company had

> "acquired legal title to its line from all the land owners on the controverted line, some by deeds and conveyances, and some by condemnation proceedings";

that it had actually constructed its road at a cost of over eight hundred thousand dollars and was actually operating the same and running trains thereon; that the Arizona & Colorado Company had done no more than locate its line and had,

> "acquired absolutely no legal title to any land for its right of way"

except two very small parcels; that the Arizona & Colorado Company's line could have been changed at small cost; that there was,

> "neither allegation nor proof of any inability on appellant's part to pay any damages which might possibly be incurred by appellee in consequence of any change in its surveyed line."

And that as to a number of the points of conflict the Denver & Rio Grande R. R. Co. had acquired title to the land by deed prior to the institution of the suit. It was argued by the appellant in that case, just as it is argued by the defendants here, that the Arizona & Colorado Company's location gave it no rights with respect to the land in con-

troversy. Upon that subject it was said (page 62 of Appellant's Brief):

> * * * "If a secret location can appropriate a man's land and prevent him from passing good title to another, then such embargo on the *jus disponendi* detracts from the efficiency of his estate in the land and takes therefrom a valuable element, viz.: the power to sell it to whom he pleases. Hence the effect of that embargo upon him is directly repugnant to the constitutional inhibitions against takng property wthout just compensation and without due process of law. If he cannot find a purchaser during the continuance of such embargo, of what avail is his estate?"

Other statements found in the Brief are the following:

> "Finally appellee's allied Arizona corporation has only built a few miles of road. The Colorado corporation has built none. Appellee itself, although nine years has expired has not moved a foot of earth nor laid a tie or rail. It has a mere naked paper railroad route, an imaginary railroad. It has never initiated the construction of a single mile of road anywhere in the entire Territory of New Mexico" (p. 69).
>
> "The decree ousting appellant from the actual operation of a constructed railroad to establish a conjectural priority of a party who has incurred, but thus far has been fortunate enough to escape the enforcement of, a forfeiture of its rights is an anomoly. It puts the shadow above the substance. The real must give way to the

imaginary. The public good is the pole star and grand aim of all government. Yet under the decree here appealed from, the present necessities of appellant and the public which it serves and has been serving on this line for over eight years, must yield to remote and conjectural future needs of appellee" (p. 70).

"That it would subserve the public interest to permit appellant to continue the operation of its railroad either instead of or in addition to that of appellee, if appellee ever builds any, is a fact so obvious as to require no argument for its demonstration. Furthermore that course would obviate the enormous pecuniary loss to appellant of over $830,000. The prospective use should yield to the more immediate necessity. The decree appealed from operates inequitably and contrary to the real justice of the case.

"Consideration of the relative convenience and inconvenience resulting from its decree, the contrast of the benefits and hardships entailed thereby, the balance of convenience, operate with persuasive and compelling force on the conscience of the Court. Those considerations suggest the impropriety of the decree appealed from" (pp. 76, 77).

The appellant in that case submitted also the following:

"POINT V.

"Appellee had an adequate remedy under the condemnation Statutes of New Mexico and that remedy was exclusive.

"Under section 3850, and those following it, of the New Mexico laws appellee could take lands for its right of way by the exercise of the power of eminent domain. If appellee had the prior right to take the lands in controversy, it could readily condemn them in the hands of appellant. That was its proper remedy.'

* * * * *

"POINT VII.

"*Appellee had an adequate remedy at law .by ejectment.*

"All the powers vested in railroad companies to construct and operate their lines, enter upon lands and make surveys and acquire their rights of way, in the exercise of the power of eminent domain, are of statutory creation. The rights thereby conferred are purely legal rights.

"Plaintiff has never been in possession of the claimed right of way. The court below in its findings does not declare that such possession ever existed. This is a fatal defect in appellee's case. Without possession, wrongfully interfered, there was no possible ground upon which to invoke the jurisdiction of a court of equity.

"On the other hand, *the facts show that before this suit was begun appellant had entered upon the right of way and actually begun the construction of its road.*

"Under these circumstances appellee had an adequate remedy at law."

The Brief in that case concluded as follows:

> "It is contrary to natural justice, as well as the public interests, for appellee to hold a right of way which it has not earned, and which it has let idle for nine years, and be permitted to thereby oust appellant, having the ability and will to serve the public and render the service afforded by appellant's constructed road. * * *
>
> "We respectfully submit that the decree should be reversed."

Despite these arguments, ably presented by learned counsel, this Court promptly *affirmed* the decree. It specifically mentioned the various claims of the appellant, including the contentions that there was no irreparable injury or other ground for equitable relief and that the plaintiff had adequate remedies under the condemnation statutes and by ejectment (233 U. S., 602). It expressly affirmed the decision of the lower court that

> "a company is entitled to protection as soon as its final location is complete."

and disposed of the other contentions as follows:

> "The objections to equitable jurisdiction do not need separate discussion. The line is found to be the best line between the points and the plaintiff is entitled to it. It neither is to be forced into a compulsory sale nor to be remitted to legal or statutory remedies that rightly are thought to be inadequate by the local court"

The principle of the foregoing decisions is well stated in *Lewis on Eminent Domain.* In Section 215 of that work, in speaking of the question of what impairment of the value of a franchise or

interference with it exercise or enjoyment will amount to a taking, the author says:

> "In so far as it is exclusive, it will be protected by the law. The exclusive right is property, which cannot be interfered with, except for public use and upon just compensation made. THE EXERCISE OF A RIVAL FRANCHISE WITHIN THE EXPRESS TERMS OF THE GRANT IS A TAKING, AND MAY BE ENJOINED UNLESS COMPENSATION IS PROVIDED. An act granting a franchise is a contract between the grantee and the State, and any subsequent act impairing its obligation is void."

Again in section 917, he says:

> "The grant of an exclusive right to maintain a bridge, ferry, railroad or canal, within certain limits, will be protected by injunction from infringement by rival or competing enterprises. Such infringement is a taking within the meaning of the constitution, for which compensation must be made."

Of course, the plaintiff's franchise is not exclusive in the sense that the State may not grant a similar franchise to another company *in another location,* just as a railroad franchise is not exclusive in the sense that the State may not authorize the construction of another railroad; but the plaintiff's franchise *is* exclusive in the sense that the State may not grant another company a franchise to operate *in the same location,* just as every railroad is exclusive in the sense that no other railroad may occupy the same location. In short, in each case the franchise is ex-

clusive to the extent that two bodies cannot occupy the same place at the same time, or, as stated by LEWIS, "the exercise of a rival franchise *within the express terms of the grant* is a taking" which may be enjoined.

This principle being thus so well settled, *and having been so recently recognized and applied by this Court in a case of exactly this kind where the very arguments now advanced by the defendants were earnestly pressed upon the attention of the court and rejected by it,* it seems entirely unnecessary to go further. It may be well, however, to point out the peculiar and particular error which pervades the defendants' arguments. In their brief below they took the unique and anomalous position that because the bill shows an utter want of right or power on their part to destroy or interfere with the plaintiff's rights, the averments of the bill with respect to their assertions and claims to the contrary, the unconstitutionality of the legislation upon which those claims are based, and the threat and intent of the defendants to place additional structures and liens upon the land, are of *no materiality and need not be considered,* because, as they say, no claim which the defendants may make can "affect the facts admitted for the purposes of this motion or the law applicable thereto."

If that position were correct, no bill to remove a cloud upon title or to cancel an invalid deed or to enjoin any wrongful claim or threatened or continued invasion of a right, could ever been maintained, because it is always essential in such a bill to show a right in the plaintiff and a want of right in the defendant.

A recent case affording a complete answer to the contention is *Lancaster v. Kathleen Oil Co.,* 241

U. S., 551. In that case the bill alleged that the plaintiff had obtained an oil and gas mining lease of certain lands; that about two months later the lessor had made another lease of the same land to the defendant; that the defendant had entered into the lease with full knowldge of the prior lease to the plaintiffs, but that it had nevertheless gone into the lease with full knowledge of the prior lease and producing and selling oil and gas. It was also alleged that the plaintiff's lease was valid and that the subsequent lease to the defendant was void. The prayer was that the defendant be enjoined from entering on the land and from continuing to operate under its lease and from interfering in any manner with the plaintiffs in conducting operations under their lease *and from asserting or claiming any right to the oil and gas deposits under the land or the right to mine and remove the same,* and that the defendant company account to the plaintiffs for the gas and oil which it had removed. The defendants argued that the suit was the equivalent of an action at law in ejectment to recover possession of the leased premises; that in such a suit it is only necessary to allege a right of possession by the plaintiff and a wrongful possession by the defendant, and that *consequently the allegations concerning the lease to the plaintiff and the invalidity of the lease to the defendant were not material and should be disregarded.* This Court held, however, that the cause of action alleged in the bill was *not* the equivalent of a suit in ejectment,

> "because the prayer of the bill makes it clear that the object of the suit was not only the recovery of possession, but also *an injunction forever restraining the defendant company from asserting any*

> *rights under its lease and from interfering with the rights of the plaintiffs under their lease.* Such relief, it is apparent, could be granted only after determining the rights of the parties under their respective leases which would require a construction of the act of Congress referred to as well as a decision concerning the authority of the Secretary of the Interior in approving the defendant company's lease and the effect to be given to such approval."

It was further urged by the defendant in that case that, if the bill be thus construed, then the suit was in substance one to quiet title and that such a suit can be brought only by one in possession. To that contention the Court responded:

> "But this contention overlooks the reason upon which the rule is based, as pointed out in the cases relied upon, which is that one out of possession has an adequate remedy at law by a suit in ejectment. As it is conceded that the legal remedy was not here available, and that there was hence jurisdiction in a court of equity to determine the right of possession, it is clear that the rule has no application and that the court had equitable jurisdiction to determine all the issues presented by the bill."
>
> "That the bill as thus construed states a cause of action within the jurisdiction of the court below as a Federal court is in substance conceded and is demonstrated by the ruling in *Wilson Cypress Co. v. Del Pozo*, 236 U. S., 635, 643-644.'

The authorities make it very clear, therefore, that the allegations in the present bill with re-

spect to the assertions and claims made by the defendant and the invalidity of those claims and assertions are most material and important. The main object of the present bill is to obtain an adjudication of the invalidity of those claims, and the prayer here, just as in *Lancaster v. Kathleen Oil Co., supra,* is for an injunction restraining the defendants from interfering in any manner with the plaintiff's exercise of its franchise and from asserting or claiming any rights under the charter of the Northern Ohio Power Company and the various Commission orders set forth in the bill. It is obvious that the plaintiff could not bring an action in ejectment because the subject matter of the suit consists of intangible rights and franchises and not the mere possession of real estate. Therefore, it is clearly entitled to maintain a bill of quiet title.

The principle is clear.

> "The allegations in the bill, so far as they seek to prevent a forfeiture of the water company's franchise, are certainly sufficient to entitle the complainant to relief in a court of equity; for, unless restrained by the courts, it is charged that the water company's franchise will be annulled and thereby its property, which is the principal security held for the benefit of complainant as the guarantor of the water company's bonds to the amount of $2,000,000, made worthless. The numerous citations hereinbefore referred to, and which it is unnecessary here to repeat, are conclusive on this question, for they all hold that a court of equity has jurisdiction to prevent such wrongs if in violation of the

constitutional provisions. *The action of the city, even if void, is certainly a cloud upon the franchise of the water company.*"

American Waterworks & Guarantee Co. v. Home Water Co., 115 Fed., 171, 181, 182.

In the case at bar the defendants' acts and claims constitute, not only a cloud upon the plaintiff's title to its franchise, but, also, an active, present and permanent interference with its exercise; for they not only assert and claim a hostile right but also *act upon the claim* by building and using dams and power houses that constitute permanent structures upon a portion of the plaintiff's right of way.

Nor is it any answer to say that the present right of possession of the land is in the defendants. The mere possession or right of possession is wholly immaterial in this case.

An exceedingly pertinent authority upon this point is *Bass v. Metropolitan West Side El. R. Co.*, 82 Fed., 857 (C. C. A. Seventh Circuit), in which the railroad company was enjoined from using certain premises for railroad purposes *although it was lawfully in possession thereof as lessee.* The plaintiff had leased the land and by mesne assignments the railroad company had become the owner of the leasehold. After taking possession under the lease the railroad company removed a portion of the building because it interfered with certain of its railroad structures located in the street upon which the land abutted. The bill was for *an injunction against the occupation and use of the premises for railroad purposes* and it was held that the plaintiff was entitled to

such injunction. The controlling inquiry, as stated by the court, was

> "whether the Metropolitan Company, *which, it is not denied, has been in rightful possession,* has appropriated or is about to appropriate any part of the leased premises *to a corporate use which is not justified by the lease.*"

The argument advanced by the defendant was that

> "the railroad company, *being the owner of the leasehold estate,* and of the buildings upon the premises in question, and *in possession of the same,* has *the right to devote all or any portion of the premises to railroad purposes* without resorting to proceedings under the eminent demain act to acquire the interest of the lessor."

As corollary or subordinate propositions, it was asserted that the plaintiff had not been damaged by the changes made in the building; that, in reality, the bill was one for specific performance, on which relief need not be granted as a matter of absolute right; that the railroad company had not violated any covenant of the lease; and that the alterations made in the building and the proposed construction and use of railroad tracks did not constitute waste. The court said that by consenting to the transfer of the leasehold to the railroad company the plaintiff undoubtedly consented "to any use of the property which was permitted to the original lessee" but it added that "it was not to be inferred that she thereby consented to *the particular use proposed.*" The court further stated that, if the question were sole-

ly one of waste already committed and there was "no appropriation of property to corporate use," it possibly would be proper to give weight to such equitable considerations as that the plaintiff's security was not impaired. It added, however,

> "but when, as here, waste has been committed by removing a substantial part of a building which was intended to be a permanent structure, *for the purpose of making way perpetually or indefinitely for the track of a railroad,* the work of removal is not to be considered by itself, but *as a step in the execution of a scheme to take property for a corporate use without making compensation,* WHICH, AS ALREADY STATED THE COURT WILL ENJOIN, THOUGH THE RIGHT INVADED BE A PURELY LEGAL OR TECHNICAL ONE. Only in that way can the policy of the enactments against the taking of private property for corporate uses without compensation be fully vindicated; and without an order for the restoration of the building to its original form, or, a forfeiture of the lease, the relief would not be adequate or complete" (p. 863).

The Court further said:

> "The demand of the appellant for *present relief* against the wrong done and intended is not met by the suggestion that, 'if the leasehold estate should be extinguished, of course the railroad company would be a trespasser, if it did not remove its girder.' The railroad company might abandon possession, leaving to the landlord the expense both of removing the girder and of reconstructing the torn down cor-

ner, with recourse for the outlay upon no responsible party; *but, more likely, the trespasser would surrender possession, if at all, only at the end of a litigation, to the expenses and contingencies of which the appellant or her successor in interest ought not, by judicial sanction, to be subjected.* The proposed occupation of the premises is shown to be necessary in order to overcome engineering difficulties which otherwise are practically insuperable, but, if it were only a matter of convenience, it would be equally evident that the occupation is intended to be, and will be, perpetual, as, doubtless, the public interest will require that it shall be. If, as was stated at the hearing, the charter of the present railroad company is limited to fifty years, that signifies only that from time to time, when necessary, new companies will be organized, to which, in succession, the road and its equipment will be transferred. *As against the lessor, such an occupation of her property is wrongful from the beginning.* The possessory right is in the lessee, and for that reason, it may be the railroad company, until the lease shall have ended by lapse of time or by forfeiture, cannot be dealt with as a trespasser; *but, that being so, it is the more important that the remedy here invoked should not be denied.* If the lease were for a short term, one year or ten, instead of ninety years, it would be evident that the railroad company has exceeded its privileges as tenant, and has invaded, appropriated, and injured present property rights of the landlord and reversion-

ary interests, which, without consent or proceedings to condemn, it had no right to take or injure" (p. 864).

With respect to the general right to an injunction in such cases, the court said (p. 860):

> "It is not disputed that injunction is the proper remedy against the appropriation of land for the use of a public corporation which has not acquired a right to the proposed use either by purchase or by condemnation; and contrary to the general rule that equitable relief is granted only when equitable considerations require it, *the injunction in such cases may be, and perhaps more frequently than otherwise is, sought in vindication of a purely legal right; and, if the technical right and a threatened infraction of it be established, the relief will be granted without inquiry into the general equities of the case.* By this we do not mean that a specific equity, like an estoppel, may not be a defence to such a suit; but, if a complete defense be not shown, *the court will not refuse the relief on grounds of equitable discretion, as it might do in a suit for specific performance or rescission or other cause involving no special constitutional or statutory right of such a nature as to be capable of vindication or enforcement only by injunction.* 'In cases of this character,' said the Supreme Court of Illinois in *Cobb v. Coal Co.*, 68 Ill., 233, 'courts of equity have acted on broader principles (than in ordinary cases), and have adopted as a rule that an injunction will be granted to prevent a rail-

way company from exceeding the power granted in their charter. * * * *The courts do not require when the effort is manifested by a railway company to wrongfully appropriate private property, or force their structures to places not authorized, that there should be a want of remedy at law.'* And in *Lewis on Eminent Domain* (section 632), it is said, in substance, that the jurisdiction of equity in such cases may be placed upon the broad grounds that when the power of eminent domain has been delegated to public officers or others who are threatening to make an appropriation of private property to public uses in excess of the power granted, or without complying with the conditions on which the right to make the appropriation is given, *equity will prevent the threatened wrong 'without regard to the question of irreparable damages or the existence of legal remedies which may afford a money compensation.'* "

Here then we have a specific illustration of the principle that a *change of use* of land may constitute *a taking*, and that where such is the case the right to an injunction is *absolute*, even though the party enjoined may be entitled to actual possession of the property for some other use which does not interfere with the plaintiff's rights. The decision is a specific rejection of the contention advanced by the defendants in this case that because the plaintiff may not now be entitled to actual physical possession of the land as against a mere private owner it follows that it is not entitled to enjoin the use which the defendants are

making of the land. As specifically stated by the court in that case, the defendants' occupation of the land for an asserted public use and its erection of the dams and power houses thereon was "*wrongful from the beginning,*" and, if by reason of the possessory right of the defendants they cannot be now dealt with as actual trespassers "It is the more important that the remedy here invoked should not be denied." As further stated by the court, the demand of the plaintiff for present relief against the wrong done and intended is not met by the suggestion that when the plaintiff completes its condemnation proceedings, the defendants "must retire and lose the benefit of all the construction it has placed thereon at its own hazard." When that time comes, the defendants (paraphrasing the language of the court) might abandon possession leaving to the plaintiff the expense of removing the structures, or, more likely, the defendants would

> "surrender possession, if at all, only at the end of the litigation, to the expenses and contingencies of which (plaintiff) ought not, by judicial sanction, to be subjected."

Still another fully sufficient answer to the contention that the plaintiff has an adequate remedy at law is the fact that *the suggested remedy, i. e., a condemnation proceeding, is available only in a State court.* For the settled rule is that, in order to defeat the equity jurisdiction of a Federal court, the legal remedy *must be one available in a Federal court.*

Landon v. Public Utilities Commission,
234 Fed., 152, at page 156; affirmed

as to this point 249 U. S., 236, at page 244.

To the same effect are:

Provisional Municipality of Pensacola v. Lehman, 57 Fed., 324 (C. C. A., 5th Circuit):
Smythe v. Ames, 169 U. S., 466, 516;
McConihay v. Wright, 121 U. S., 201, 206.

A familiar illustration of this principle is found in the cases holding that the concurrent jurisdiction of Federal Courts of equity with respect to claims against decedents' estates is not defeated by the existence of State statutes affording a remedy in the State probate courts even though such statutes purport to make the remedy in the State courts exclusive.

Lawrence v. Nelson, 143 U. S., 215;
Security Trust Company v. Black River National Bank, 187 U. S., 211;
Waterman v. Canal-Louisiana Bank, 215 U. S., 633.

Indeed, it is a well settled principle that the jurisdiction of the Federal courts is wholly independent of State action and is therefore

> " a power which the States may not by any exercise of authority in any form, directly or indirectly, destroy, abridge, limit or render inefficacious."

Harrison v. St. Louis & San Francisco R. R. Co., 232 U. S., 318, 328.

Consequently, as by the principles of equity jurisprudence as recognized in the Federal

courts, the plaintiff in this case is entitled to sue in equity, such right is not in any way defeated or impaired by the assumed existence of a legal remedy available only in a State court.

It is settled too, that

> "it is not enough that there is a remedy at law. It must be plain and adequate, or, in other words, as practical and efficient to the ends of justice, and its prompt administration as a remedy in equity."
>
> *Payne v. Hook*, 7 Wall., 426, 430;
> *Walla Walla v. Walla Walla Water Co.*,
> 172 U. S., 1, 12.

In *Cleveland City Railway Co. v. Cleveland*, 94 Fed., 385 (affirmed 194 U. S., 517) Judge RICKS said:

> "That a bill in equity seeking a judicial decree declaring an ordinance which impairs the contract rights of the plaintiff or takes from him or it property without due process of law is a proper remedy, has been specifically determined by the Supreme Court. Citing cases."

It is also established that

> "where * * * the damage * * * is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction."
>
> *Walla Walla v. Walla Walla Water Co.*,
> 172 U. S., 1, 12.

That a condemnation proceeding is not an adequate remedy in this case is in fact demonstrated by *Cuyahoga River Power Company v. Northern*

Realty Co., 244 U. S., 300. The State Court may continue *ad infinitum* to do precisely the same thing it did in that case, *viz.*, dismiss the condemnation proceeding in such way as to make it impossible to say whether its judgment is rested upon State questions or upon the Federal questions arising out of the Traction Company's claim that its own use of the land prevents the plaintiff from acquiring it, *and thereby deprive the plaintiff of any opportunity to obtain an adjudication by this court with respect to its constitutional rights.*

The decree should be reversed with costs.

Respectfully submitted,
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